

Caterpillar, Inc. and International Union, United Automobile, Aerospace and Agricultural Implement Workers of America and its Local 145, 751, 786, 974, and 2096. Cases 33-CA-9876-3 et al.

January 18, 1994

ORDER

The National Labor Relations Board has decided to include in the bound volumes the attached Order, which issued on November 9, 1993.

By direction of the Board: Joseph E. Moore, Deputy Executive Secretary.

ORDER

November 9, 1993

A hearing in the above proceeding opened before Administrative Law Judge James Rose of the National Labor Relations Board. During the course of the hearing, on September 22, 1993, employee George H. Boze Jr. was called by the General Counsel to testify concerning issues raised in a number of cases involving what have been characterized as "the insignia or button issues."¹ Upon completion of Boze's testimony on direct, the Respondent requested copies of all statements Boze had given to the Board. The judge directed production of any statements given without regard to the specific issues or cases involved and regardless of whether the witness had testified in connection with those cases or issues. Counsel for the General Counsel objected to being compelled to produce affidavits involving issues which were not then being litigated and in cases which were not before the administrative law judge. Judge Rose overruled the General Counsel's objections and held that under the *Jencks Act*, 18 U.S.C. § 3500, all affidavits of a testifying witness are producible. The General Counsel complied with the judge's directive.

The same process was followed with respect to the remaining witnesses scheduled for this discrete segment of the hearing, i.e., the judge required the production of all affidavits given by the witnesses, several of whom had given affidavits in various cases that were not then being litigated and regarding matters on which the witnesses had not testified. Pursuant to the judge's order, all affidavits were produced and were utilized by Respondent's counsel in cross-examination.²

¹ The General Counsel has completed the first of at least five discrete segments to be litigated before the judge and the hearing in this case is expected to last into the spring of 1994.

² Affidavits produced and provided to the Respondent included statements given to the Regional Office in cases not before the administrative law judge and in cases which are still under investigation. Judge Rose also compelled the production and delivery of the Board agent's notes of telephone and personal conversations with

On September 28, 1993, the General Counsel moved the judge to reconsider his ruling. In denying the motion for reconsideration, the judge held that the *Jencks* rule is essentially an agency housekeeping rule, that it is his understanding that the underlying rationale of *Jencks* "is to allow the defendant to have access to any information that the government has which is exculpatory or which effects [sic] the credibility of the witness," and that any material a person puts in an affidavit and signs under oath may contain exculpatory material in it. The judge further observed that he can look at affidavits in camera, "but the problem is I really don't know . . . what information the Respondent has." Judge Rose further asserted that he did not know what evidence the General Counsel had or what the Respondent had and in response to this perceived dilemma, Judge Rose stated: "And so I will err on the side of giving that information to the Respondent, as I believe it is the spirit of the *Jencks* rule."

The General Counsel has filed a request for special permission to appeal from the judge's ruling regarding production of affidavits, contending that the judge has not followed Section 102.118(b)(1) and (2) of the Board's Rules and Regulations, that the judge has interpreted and applied the *Jencks* rule in an overly broad fashion, and that the breadth of his ruling is particularly in doubt here "in that the Respondent has demonstrated a proclivity toward engaging in conduct warranting prosecution for violating the Act as evidenced by the fact that three dozen complaints have issued against the Respondent and have been consolidated for trial in this matter, that six more complaints have issued which have not been consolidated for trial before Judge Rose, and that there are currently over twenty additional charges which have been filed against the Respondent and are pending investigation before various Regional Offices of this Agency." The General Counsel further argues that the judge's ruling not only provides the Respondent with unqualified discovery in some instances but also permits the Respondent to go on a fishing expedition in connection with certain cases still under investigation.

Having duly considered the matter, the Board has decided to grant the General Counsel's appeal and, on the merits, reverse the judge's rulings regarding the production of statements under *Jencks*.

As the administrative law judge correctly observed, Section 102.118(b)(1) and (2) of the Board's Rules and Regulations is an "agency housekeeping rule" adopted by the Board in response to the U.S. Supreme Court's *Jencks*' decision³ and the subsequently enacted *Jencks Act*, 18 U.S.C. § 3500. The Board's Rule is very specific in setting forth the procedure to be followed in

witnesses where, according to the General Counsel, the witnesses were unaware of the notes and did not sign or adopt the notes.

³ *Jencks v. U.S.*, 353 U.S. 657 (1957).

situations of this kind. In this regard, Section 102.118(b)(2) provides as follows:

(2) If the General Counsel claims that any statement ordered to be produced under this section contains matter which does not relate to the subject matter of the testimony of the witness, the administrative law judge shall order the General Counsel to deliver such statement for the inspection of the administrative law judge *in camera*.

This section further provides that on delivery the judge “*shall excise the portion of such statements which do not relate to the subject matter of the testimony of the witness,*” although the judge may exercise discretion by declining to excise portions which, while unrelated to the witness’ testimony, do relate to other matters raised by the pleadings. (Emphasis added.)

When viewed in light of the provisions of Section 102.118(b)(1) and (2), it is clear that the judge has (1) given an overly broad application to *Jencks*; (2) ignored the Rule’s direction that the judge should excise portions of a statement which do not relate to the matters as to which the witness has testified or to matters

raised by the pleadings; and (3) erred by compelling the production of notes and memoranda in the absence of evidence that they were adopted by the witness.⁴ Accordingly,

IT IS ORDERED that the General Counsel’s request for special permission to appeal the judge’s ruling is granted, the administrative law judge’s ruling is vacated, and the above proceeding is remanded to Administrative Law Judge James Rose for further action consistent with this Order.

⁴ Contrary to the judge’s unqualified assertion that *Jencks* requires the prosecutor to produce all exculpatory material contained in the files, both the Board and reviewing courts have held that the General Counsel is under no general obligation to disclose any exculpatory evidence uncovered during the pretrial investigation. See *North American Rockwell Corp. v. NLRB*, 389 F.2d 866 (10th Cir. 1968). Further, the Board has held that absent evidence that notes and memos were adopted or approved by the witnesses, they are not witness statements (and hence not producible) under *Jencks*. *Stride Rite Corp.*, 228 NLRB 224, 226 fn. 3 (1977). See also Sec. 102.118(d) of the Board’s Rules which defines the term “statement.” Although, as indicated above, the judge is not without discretion in this area, here the judge failed to exercise the discretion the Rule grants him and instead ordered wholesale disclosure of information in the General Counsel’s files.